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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-115

HYMEN SCHLESINGER and DAVID A. HENSLER,
Petitioners,

v.

HON. HUBERT TEITELBAUM, United States District Judge,
Respondent.

and

POINT TOWING COMPANY, INC., RIVER TRANSPORTATION, INC., and M. G. TRANSPORT SERVICES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT.

MEMORANDUM FOR POINT TOWING COMPANY, INC., RIVER TRANSPORTATION INC., AND M. G. TRANSPORT SERVICES, INC., RESPONDENTS

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The Petition for Writ of Certiorari raises the issues of 1.) Whether the District Court has the power *sua sponte* to set aside an agreement for counsel fees entered into by a seaman and his attorney and 2.) Whether the District

Court has the power to adopt and apply a local rule providing a schedule of attorney's fees for seamen's cases.

The Court of Appeals for the Third Circuit upheld the District Court's exercise of power on both issues. Its Opinion is reported at 475 F. 2d 137.

Petitioner, David A. Hensler, had filed an action as a seaman for personal injuries against Point Towing Company, Inc., River Transportation, Inc. and M. G. Transport Services, Inc., in the United States District Court for the Western District of Pennsylvania. He was represented by Hymen Schlesinger, Esquire, the other Petitioner.

The case came on for trial and during which the parties agreed upon a compromise settlement in the amount of $17,500.00. The District Judge then proceeded to hold a hearing to approve the settlement as required by a local rule of Court. During the settlement hearing the District Judge stated that he was guardian of the seaman and as such, had the power to fix counsel fees. It was pointed out of the Judge that the seaman and his attorney had an agreement providing for counsel fees of one-third (1/3) of the amount of the settlement. Notwithstanding the fact that the seaman made no objection to the counsel fees, the District Judge *sua sponte* set the agreement aside and fixed counsel fees according to a schedule that had been adopted by the Board of Judges.

Both the seaman and his attorney filed a Petition for Mandamus in the Court of Appeals challenging the District Judge's power to fix the attorney's fees contrary to their agreement.

The Court of Appeals sustained the action of the District Judge. The Court's opinion seems to be based upon the Court's supervisory power over the members of its bar,

the traditional concept that the seaman is the ward of the Admiralty Courts, and the rule making powers of the Court.

It is respectfully submitted that the lower court has overlooked important constitutional limitations upon the jurisdiction of the district courts.

Article III of the Constitutional makes it very clear that jurisdiction of the courts is limited to "cases and controversies". It is well settled that "*cases and controversies*" mean issues presented in an adversary context.

In the matter presently before this Court, there was no adversary proceeding; neither the seaman nor the attorney wanted any change in his fee agreement. However, the District Judge *sua sponte* set the fee agreement aside.

In the case of *Crossen v. Breckenridge*, 446 F. 2d 883 (CA6, 1971) the Court stated:

> "The case or controversy requirement places two limitations on Article III courts. The first is that courts may not encroach on areas reserved to the other branches of government, and the second is that courts may decide only those cases 'presented in an adversary context and in a form historically viewed as capable of resolution through the judical process.' Flast v. Cohen, 392 U. S. 83, 95, 88 S. Ct. 1942, 1950, 20 L. Ed 2d 947 (1968). An actual controversy is supplied by plaintiffs with a 'personal stake and interest,' Barlow v. Collins, 397 U. S. 159, 164, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970), Baker v. Carr, 369 U. S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), arrayed against persons with adverse legal interests against persons with adverse legal interests in a sufficiently immediate adversary context to warrant declaratory relief. Golden v. Zwickler, 394 U. S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 23 113 (1969)."

In *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77 (N. D. Cal. 1972) the court stated:

> "The Constitution creates a tripartite system of government and limits the courts to 'cases and controversies' and to only such of those as to which they are expressly given jurisdiction by statute. Most importantly, they are not given general visitatorial jurisdiction over the other branches of government and their agencies, nor are they given jurisdiction, *sua sponte* or otherwise, to order the proper execution of every act of Congress. Litigants, counsel, and particularly Federal judges should always bear in mind the admonition of the then Mr. Justice Stone that 'Courts are not the only agency of government that must be assumed to have capacity to govern.' Dissenting opinion in United States v. Butler, 297 U. S. 1, 87, 56 S. Ct. 312, 329, 80 L. Ed. 477."

It is respectfully submitted that the regulation of attorney's fees, except in adversary proceedings, is strictly a matter for the legislature. Congress has seen fit to regulate attorney's fees in many areas of the law, *viz,* Title 28 U. S. C. Section 2678, Suits against United States; Title 38 U. S. C. Section 784, Claims By Veterans; Title 18 U. S. C. Section 3006 A, Court Appointed Attorneys; Title 5 U. S. C. Section 8127, Workmen's Compensation for Government Employees; Title 22 U. S. C. Section 1623, International Claims Settlement Act of 1949; Title 50 U. S. C. Section 1985, American-Japanese Evacuation Claims Act; Title 31 U. S. C. Section 243, Military Personnel and Civil Employees Claim Act of 1964; Title 42 U. S. C. Section 406, Claimants under the Social Security Act; Title 25 U. S. C. Section 81a, Legal Services Performed for Indians.

Congress has not seen fit to regulate attorney's fees in cases arising under the *Federal Employers Liability Act,* Title 45 U. S. C. Sections 51 *et seq.* or in seamen's cases arising under the *Jones Act,* Title 46 U. S. C. Section 688.

The federal courts cannot perform functions of the legislature through the rule making powers granted by Congress.

The rule making power of the courts comes from Title 28 U. S. C. Section 2072 which specifically provides that:

> "Such rules shall not abridge, enlarge or modify any substantive right . . ."

It seems clear that the regulation of attorney's fees is the regulation of substantive rights contrary to the enabling act.

Finally, the concept that seamen are wards of the Court will not justify the decision of the lower court. This concept must be placed on its proper perspective. A close examination of the law reveals that it has been the legislature and the courts that have protected the rights of seamen. In *U. S. Bulk Carriers v. Arguelles*, 400 U. S. 351, 355 (1971) this Court described the concept as follows:

> "Seamen from the start were wards of admiralty. See Robertson v. Baldwin, 165 U. S. 275, 287, 17 S. Ct. 326, 331, 41 L. Ed. 715. In 1872 it was provided that the federal courts might appoint shipping commissioners 'to superintend the shipping and discharge of seamen' in our merchant fleet. Cong. Globe, 42d Cong. 2d Sess., 1836. Commissioners indeed served, 46 U. S. C. Section 541 (1940 ed.), as an administrative adjunct of the federal courts until July 16, 1946, when Section 104 of Reorganization Plan No. 3 of 1946 abolished them. 60 Stat. 1098. No other administrative agency was substituted. The federal courts remained as the guardians of seamen, the agencies chosen by *Congress, to enforce their rights*. . ."

The scope of the legislation affecting seamen is contained in this Court's opinion in the case of *Aguilar v. Standard Oil Co.*, 318 U. S. 324 (1943). In the case of *Isbrandtsen Co. v. Johnson*, 343 U. S. 779 (1952) this court speaking through Mr. Justice Burton stated at page 784:

> "Congressional legislation now touches nearly every phase of a seaman's life. It concerns itself with his personal safety, comfort and health in many ways

> not necessary to review here. It deals specifically with his shipping articles and the payment to him of his wages. It insures generally a partial payment to him of his wages at each port where his vessel loads or delivers cargo. It insures the payment to him of the balance of those wages upon completion of his voyage or shortly after his discharge. It deals explicitly with the final payment of wages. It describes 'forfeitures' which lawfully may be deducted from a seaman's wages 'for the benefit of master or owner by whom the wages are payable.' "

Notwithstanding this abundant legislation touching the lives of seamen, Congress has seen fit not to regulate attorney's fees for seamen although Congress has freely exercised this power in many other areas of the law.

Conclusion

Respondents, Point Towing Company, Inc., River Transportation, Inc., and M. G. Transport Services, Inc., respectfully request that the Petition for Certiorari be granted.

Respectfully submitted,

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